Supreme Court, U.S.
FILED
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06-957 NOV 04 2006
OFFICE OF THE CLERK

No.

IN THE
Supreme Court of the United States

Jose Rene HERNANDEZ
Petitioner, Pro Se

vs.

Margarita ARELLANO, individually, Julie Beth TODARO, Roberta Ivy SHAFFER, individually, Mary Lynn RICE-LIVELY, individually, John DOE, graduate student, Margaret Ann YACKEY, graduate student, Peter LARSEN, graduate student, Amy FILIATREAU, graduate student, A.J. JOHNSON, graduate student
Respondents,

On Petition For Writ of Certiorari
To The United States Court of Appeals
For The Fifth Circuit

APPENDIX

signed

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UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 05-50584
Summary Calendar

D.C. Docket No. 1:03-CV-317-LY

JOSE RENE HERNANDEZ

Plaintiff - Appellant

v.

MARGARITA ARELLANO, Individually; JULIE BETH TODARO; ROBERTA IVY SHAFFER, Individually; MARY LYNN RICE-LIVELY, Individually; JOHN DOE; Graduate Student; MARGARET ANN YACKEY, Graduate Student; PETER LARSEN, Graduate Student; AMY FILIATREAU, Graduate Student; A J JOHNSON, Graduate Student

Defendants – Appellees

Appeal from the United States District Court for the

Western District of Texas, Austin.

Before BARKSDALE, STEWART, and CLEMENT, Circuit Judges.

JUDGMENT

This cause was considered on the record of appeal and the brief on file.

It is ordered and adjudged that the judgment of the District Court is affirmed.

IT IS FURTHER ORDERED that the plaintiff – appellant pay to defendants – appellees the costs on

appeal to be taxed by the Clerk of this Court.

ISSUED AS MANDATE:

FILED Aug 21 2006 CLERK, U.S. DISTRICT COURT WESTERN DISTRICT OF TEXAS BY s/JK DEPUTY CLERK

A True Copy Attest Clerk, U.S. of Appeals, Fifth Circuit
BY: s/ Joel Rodriguez DEPUTY

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 05-50584

Summary Calendar

FILED July 14,2006 Charles R. Fulbruge III Clerk

JOSE RENE HERNANDEZ,

Plaintiff-Appellant,

versus

MARGARITA ARELLANO, Individually;

JULIE BETH TODARO; ROBERTA

IVY SHAFFER, Individually;

MARY LYNN RICE-LIVELY, Individually;

JOHN DOE, Graduate Student;

MARGARET ANN YACKEY, Graduate Student;

PETER LARSEN, Graduate Student;

AMY FILIATREAU, Graduate Student;

A J. JOHNSON, Graduate Student,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 1:03-CV-317

Before BARKSDALE, STEWART and CLEMENT, Circuit Judges.

PER CURIAM:*

Jose Rene Hernandez filed an action under 42 U.S.C. §§ 1983 and 1985 against current and former administrators and students of the University of Texas arising from their alleged conspiracy to interfere with the proper functioning of his university e-mail account because of his nationality.

The district court granted the defendants' motion to dismiss the claims under Federal Rule of Civil Procedure 12(b)(6). The court also denied Hernandez's motions for appointment of counsel, for leave to file a second amended complaint, for sanctions against defense counsel, and to disqualify the magistrate judge.

Hernandez asserts that the district court erred in granting the defendants' motion to dismiss his First Amendment claims. Hernandez claimed that the defendants violated his rights under tne First Amendment by "violating" his e-mail account in a way that restricted his access to his graduate program's listserv. He conceded in the amended complaint that he did not know who made the alleged change to his email account or how it was done. The conclusory allegations do not state a claim for relief. *See Chiras v. Miller*, 432 F.3d 606, 611 (5th Cir. 2005).

Next Hernandez asserts that the district court

erred by denying his motion for leave to file a second amended complaint after the magistrate judge determined that his case should be dismissed.

The district court denied the motion on the basis that Hernandez had failed to take advantage of a previous opportunity to amend his complaint. The court did not abuse its discretion. *See Quintanilla v. Texas Television Inc.*, 139 F.3d 494, 499 (5th Cir. 1998).

Hernandez also argues that the district court erred in refusing to appoint counsel. The district court considered each of the four factors listed in *Jackson v. Dallas Police Department*, 811 F.2d 260, 261-62 (5th Cir. 1986), for determining whether appointment of counsel is appropriate. It concluded (1) the case was not complex; (2) Hernandez had not shown he was unable to present his claims; (3) he seemed capable of understanding the federal rules governing discovery; and (4) he failed to show that the case would present a large amount of conflicting testimony, and his admission into graduate school reflected his intellectual abilities. Accordingly, the court did not abuse its discretion. *See id.*

Next Hernandez asserts that the district court erred in failing to order the magistrate judge to answer Hernandez's motion to disqualify him. This issue is frivolous; there is no requirement that the magistrate judge respond to a motion for disqualification. See 28 U.S.C. § 455; *Liteky v. United States*, 510 U.S. 540, 541-56 (1994). Moreover, the district court ruled on the motion.

In addition, Hernandez argues that the district court abused its discretion in denying his motion for sanctions against the defense attorneys under Rule 11. He asserts that the court erred in failing to investigate and adequately explain whether sanctions were proper. Due to the nature of the outlandish accusations in

Hernandez's motion, the district court did not abuse its discretion. *See Friends for Am. Free Enter. Ass'n v. Wal-Mart*, 284 F.3d 575, 577-78 (5th Cir. 2002).

Finally, Hernandez asserts two other issues in the Statement of Issues in his brief that he does not include in the body of the brief: that the district court erred in failing to consider documents attached to his complaint in ruling on the 12(b)(6) motion and that the court erred in limiting discovery and failing to supervise a pre-trial conference. Hernandez waived these issues by his failure to brief them. *See Yohey v. Collins*, 985 F.2d 222, 224-25 (5th Cir. 1993).

AFFIRMED.

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*Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 05-50584

FILED AUG 09 2006
CHARLES R. FULBRUGEIII, CLERK

JOSE RENE HERNANDEZ

Plaintiff – Appellant

v.

MARGARITA ARELLANO, Individually; JULIE BETH TODARO; ROBERTA IVY SHAFFER, Individually; MARY LYNN RICE-LIVELY, Individually; JOHN DOE, Graduate Student; MARGARET ANN YACKEY, Graduate Student; PETER LARSEN, Graduate Student; AMY FILIATREAU, Graduate Student; A J JOHNSON, Graduate Student

Defendants – Appellees

Appeal from the United States District Court for the Western District of Texas, Austin

---

ON PETITION FOR REHEARING AND REHEARING EN BANC

(Opinion 7/14/06, 5 Cir., ____, _____ F. 3d _____)

Before BARKSDALE, STEWART and CLEMENT, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED. R. App. P. and 5th CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor, (FED. R. APP. P. and 5th CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service and not disqualified not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

s/ Carl E Stewart

United States Circuit Judge

REHG-4A

Appendix B.....

Order and Final Judgment of the U.S. District Court, Western District of Texas, Austin Division, Chief Judge Leroy Yeakal granting Defendants' Motion for Dismissal under Rule 12(b)(6) for Failure to State a Claim, filed 1st March 2005 and Denial of Reconsideration of court appointed counsel, and Denial of Plaintiff Hernandez Motion to Disqualify Magistrate Judge Robert Pitman, filed 1st March 2005.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

Filed 03/01/2005

JOSE RENE HERNANDEZ	§
PLAINTIFF	§
v.	§
MARGARITA ALLENAO	§
(INDIVIDUALLY), JULIE BETH	§
TORDARO, ROBERTA IVY SHAFFER	§ A03CA317LY
(INDIVIDUALLY), MARY LYNN	§
RICE-LIVELY (INDIVIDUALLY),	§
JOHN DOE (GRADUATE STUDENT),	§
MARGARET YACKEY (GRADUATE	§
STUDENT), PETER LARSEN	§
(GRADUATE STUDENT),	§
AMY FILIATREAU (GRADUATE	§
STUDENT), AJ JOHNSON(GRADUATE STUDENT)	§
DEFENDANTS.	§

ORDER

Before the Court are Defendants', Margarita Arellano, Julie Beth Todaro, Roberta Ivy Shaffer, John Doe, Margaret Ann Yackey, Peter Larsen, Amy Filiatreau, and AJ Johnson, [n1] Motion to Dismiss filed April 30, 2004 (Doc. #35); Plaintiff Pro Se Hernandez's Opposition Against the Defense Counsel's Motion to

Dismiss under Rule 12(b) and Assertion of Qualified Immunity filed May 11, 2004 (Doc. #38); and Defendants', Margarita Arellano, Julie Beth Todaro, Roberta Ivy Shaffer, John Doe, Margaret Ann Yackey, Peter Larsen, Amy Filiatreau, and AJ Johnson, Reply to Defendants' Motion to Dismiss and Assertion of Qualified Immunity filed May 20, 2004 (Doc. #42). The motion, response and reply were referred to the United States Magistrate Judge for findings and recommendations pursuant to 28 U.S.C. § 636(b), Rule 72 of the Federal Rules of Civil Procedure, and Rule 1(d) of Appendix C of the Local Rules of the United States District Court for the Western District of Texas, as amended. The Magistrate Judge file his Report and Recommendation August 9, 2004 (Doc. #44). On August 20, 2004, Plaintiff Hernandez filed his Motion to Opposition and Memorandum to Deny or Vacate the Magistrate's Report to Gran the Dismissal of Plaintiff's Complaint (Doc. #49). He also filed the following motions: (1) Plaintiff Hernandez's Motion to the District Court Petitioning Permission or Leave of the Court to Amend and Supplement his Complaint filed August 20, 2004 (Doc. #47); (2) Motion to Disqualify Magistrate Judge Robert Pitman from Presiding at Proceedings to Filed Cause of Complaint Entitled Above, Pursuant to Title 28 U.S.C. § 455 filed August 9, 2004 (Doc. # 45); (3) Plaintiff Hernandez's Motion for Sanctions Against the Defense Counsel Shelley Dahlberg and Previous Counsel John Grey (Doc. # 53-1) and Request for Oral Hearing (Doc. #53-2) filed October 8, 2004; and (4) Plaintiff Hernandez's Motion to the District Court to Reconsider the Appointment of Counsel filed October 8, 2004 (Doc. #54).

The Magistrate Judge recommended that the Court grant Defendants' motion to dismiss for failure to state a constitutional violation. In light of Plaintiff's objections, the Court must undertake a *de novo* review

of the entire case file in this action. Upon full *de novo* review of the record in this cause and applicable law, the Court finds that the Magistrate Judge's findings and recommendations are proper and should be accepted for the reasons stated therein.

The Court further finds that Plaintiff Hernandez's Motion to the District Court Petitioning Permission or Leave of the Court to Amend and Supplement his Complaint (Doc. #47) should be *denied*. As noted in footnote 4 of the Magistrate Judge's Report and Recommendation (Doc. #44), Plaintiff was afforded an opportunity to correct his pleading deficiencies to no avail. He again fails to show why he should be afforded another opportunity. The Court also finds that Motion to Disqualify Magistrate Judge Robert Pitman from Presiding at Proceedings to Filed Cause of Complaint Entitled Above, Pursuant to Title 28 U.S.C. § 455 (Doc. #45) should be denied. Plaintiff asserts that Judge Pitman and his law clerks are biased, but he provides no evidence other than the Judge Pitman's Report and Recommendation.

In addition, the Court finds that Plaintiff Hernandez's Motion to Sanctions Against the Defense Counsel Shelley Dahlberg and Previous Counsel John Grey (Doc. #53-1) should be denied as counsels' actions as described by Plaintiff in his motion do not rise to the level of sanctionable conduct. Finally, the Court finds that Plaintiff Hernandez's Motion to the District Court to Reconsider the Appointment of Counsel (Doc. #54) should be denied as the Court's review reveals no substantial change in the factors considered by the Court in Plaintiff's previous motion for appointment of counsel.

IT IS THEREFORE ORDERED that the United States Magistrate Judge's Report and Recommendation filed in this cause is hereby

APPROVED and **ACCEPTED** by the Court.

IT IS FURTHER ORDERED that Plaintiff Hernandez's Motion to the District Court Petitioning Permission or Leave of the Court to Amend and Supplement his Complaint filed August 20, 2004 (Doc. #47) is **DENIED**.

IT IS FURTHERED ORDERED that the Motion to Disqualify Magistrate Judge Robert Pitman from Presiding at Proceedings to Filed Cause of Complaint Entitled Above, Pursuant to Title 28 U.S.C. § 455 filed August 9, 2004 (Doc. #45) is **DENIED**.

IT IS FURTHERED ORDERED that Plaintiff Hernandez's Motion to the District Court to Reconsider the Appointment of Counsel filed October 8, 2004 (Doc. # 54) is **DENIED**.

IT IS FURTHERED ORDERED that Plaintiff Hernandez's Motion for Sanctions Against the Defense Counsel Shelley Dahlberg and Previous Counsel John Grey filed October 8, 2004 (Doc. #53-1) is **DENIED.**

IT IS FURTHER ORDERED that the Request for Oral Hearing (Doc. #53-2) filed October 8, 2004 is **DISMISSED AS MOOT**.

IT IS FURTHER ORDERED that Defendants' Margarita Arellano, Julie Beth Todaro, Roberta Ivy Shaffer, [Mary Lynn Rice-Lively,] John Doe, Margaret Ann Yackey, Peter Larsen, Amy Filiatreau, and AJ Johnson, Motion to Dismiss filed April 30, 2004 (Doc. #35) is **GRANTED**. All Plaintiff's claims against Defendants are **DISMISSED WITH PREJUDICE**.

IT IS FINALLY ORDERED that all further relief not expressly granted is **DENIED**.

SIGNED THIS _1ST_ day of March, 2005.

s/ Lee Yeakel

LEE YEAKEL

UNITED STATES DISTRICT JUDGE

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1. Defendants' motion to dismiss does not list Defendant Mary Lynn Rice-Lively in the title. However, the body of the motion indicates that she is included as a movant.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

Filed 03/01/2005

JOSE RENE HERNANDEZ	§
PLAINTIFF	§
v.	§
MARGARITA ALLENAO	§
(INDIVIDUALLY), JULIE BETH	§
TORDARO, ROBERTA IVY SHAFFER	§A03CA317LY
(INDIVIDUALLY), MARY LYNN	§
RICE-LIVELY (INDIVIDUALLY),	§
JOHN DOE (GRADUATE STUDENT),	§
MARGARET YACKEY (GRADUATE	§
STUDENT), PETER LARSEN	§
(GRADUATE STUDENT),	§
AMY FILIATREAU (GRADUATE	§
STUDENT), AND AJ JOHNSON	§
(GRADUATE STUDENT),	§
DEFENDANTS.	§

FINAL JUDGMENT

Before the Court is the above entitled cause of action. On this same date this Court signed an order dismissing with prejudice Plaintiff's claims against Defendants. Accordingly, the Court enters the following

Final Judgment pursuant to Federal Rule of Civil Procedure 58.

IT ORDERED, ADJUDGED, AND DECREED that Defendants', Margarita Arellano, Julie Beth Todaro, Roberta Ivy Shaffer, [Mary Lynn Rice-Lively,] John Doe, Margaret Ann Yackey, Peter Larsen, Amy Filiatreau, and AJ Johnson, Motion to Dismiss is **GRANTED**. All Plaintiff's claims against Defendants are **DISMISSED WITH PREJUDICE**.

IT IS FURTHERED ORDERED that all relief not expressly granted is hereby **DENIED**.

IT IS FINALLY ORDERED that the case hereby **CLOSED**.

SIGNED this __1st__ day of March, 2005

s/ Lee Yeakel

LEE YEAKAL

UNITED STATES
DISTRICT JUDGE

Appendix C.....

Report and Recommendations of the Magistrate Judge Pitman recommending Dismissal of Hernandez's Rule 7 Reply Complaint filed 9th August 2004.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

Filed 08/08/2004

JOSE RENE HERNANDEZ	§
Plaintiff	§
v.	§A-03-CA-317 LY
MARGARITA ARELLANO (individually),	§
JULE BETH TODARO, ROBERTA IVY	§
SHAFFER, (individually), MARY LYNN	§
RICE-LIVELY (individually), JOHN DOE	§
(graduate student) MARGARET YACKEY	§
(graduate student), PETER LARSEN	§
(graduate student), AMY FILIATREAU	§
(graduate student), and AJ JOHNSON	§
(graduate student),	§
Defendants.	§

REPORT AND RECOMMENDATION
OF THE UNITED STATES MAGISTRATE JUDGE

TO: THE HONORABLE LEE YEAKEL
CHIEF UNITED STATES DISTRICT JUDGE

Before the Court are Defendants', Margarita Arellano, Julie Beth Todaro, Roberta Ivy Shaffer, John Doe, Margaret Ann Yackey, Peter Larsen, Amy

Filiatreau, and AJ Johnson, Motion to Dismiss, filed April 30, 2004 (Clerk's Dkt. #35); Plaintiff Pro Se Hernandez's Opposition Against the Defense Counsel's Motion to Dismiss Under Rule 12(b) and Assertion of Qualified Immunity, filed May 11, 2004 (Clerk's Dkt. #38); and Defendants', Margarita Arellano, Julie Beth Todaro, Roberta Ivy Shaffer, John Doe, Margaret Ann Yackey, Peter Larsen, Amy Filiatreau, and AJ Johnson, Reply to Defendant's Motion to Dismiss and Assertion of Qualified Immunity, filed May 20, 2004 (Clerk's Dkt. #42). The dispositive motion was referred by United States District Judge Lee Yeakal to the undersigned for a Report and Recommendation as to the merits of the motion pursuant to 28 U.S.C. § 636(b), Rule 72 of the Federal Rules of Civil Procedure, and Rule 1(d) of Appendix C of the Local Rules of the United States District Court for the Western District of Texas.

After reviewing the parties pleadings, relevant case law, as well as the entire case file, the undersigned issued the following Report and Recommendations to the District Court.

I. BACKGROUND

On May 21, 2003 Plaintiff Jose Rene Hernandez ("Hernandez") filed a complaint against Margarita Arellano ("Arellano"), Julie Beth Todaro ("Todaro"), Roberta Ivy Shaffer ("Shaffer"), Mary Lynn Rice-Lively ("Rice-Lively"), John Doe ("Doe"), Margaret Ann Yackey ("Yackey"), Peter Larsen ("Larsen"), Amy Filiatreau ("Filiatreau"), and AJ Johnson ("Johnson"), alleging violations of 42 U.S.C. § 1983 as well as Title VI and Title IX. Plaintiff filed an amended complaint on April 14, 2004. [n1]

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[1] The pleading filed by Plaintiff entitled First Amended Complaint begins with a 38 page introduction section, continues with a 25 page section containing the numbered paragraphs generally found in a

Plaintiff identifies himself as a Hispanic male who was enrolled as a graduate student at the University of Texas Graduate School of Library and Information Science during the spring semester of 2001. (Plf. 1st. Am Compl ¶3.1). He alleges his university-issued email account was "violated and interfered with" in March 2001, without notice or explanation. (Id.). This "violation" resulted in removing or suspending Hernandez' membership in the college-supported listserv "glissa." According to Plaintiff, this listserv functions as an electronic bulletin board, discussion group and information source regarding classes, jobs, deadlines and meetings. (Id.). Plaintiff alleges his consequent inability to both send and receive messages within the college community effectively interfered with his First Amendment rights of free association and communication. (Id.).

Hernandez alleges he "suspected that the change in his email account was accidental but deliberately interfered with or violated but he did not know by whom or how it was done." (Id. ¶ 3.2) Plaintiff reasoned that Associate Dean Rice-Lively, and the technical staff she supervised were the ones responsible for the "violation" of his email account. (Id.). Because he believed the administration of the college would not wish to help him, Hernandez decided to complain to the Office of the Ombudsman at the university on April 24, 2001. (Id.).

Plaintiff alleges Dean Shaffer, Rice-Lively and Todaro colluded together to provide false and

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complaint, and concludes with approximately 50 pages of various attachments. In light of Plaintiff's pro se status, the Magistrate Court will attempt to construe the entire pleading liberally. *See Haines v. Kerner*, 404 U.S. 519, 520-21, 92 S.Ct. 594, 596 (1972) (allegations of pro se complaint held to less stringent standards than formal pleadings drafted by lawyers.)

misleading information to the Ombudsman concerning the violation of his email account. He maintains those defendants provided a variety of explanations for the account interference, misstated university policy, denied knowledge of the misconduct and falsely stated the technical staff was unable to restore his account. (Id.). Hernandez claims these actions were a violation of his "due process right to receive his education without being subjected to a hostile environment, subjected to discrimination and a discriminatory effect." (Id.). He further asserts the actions of the defendants in deliberately denying him a reasonable opportunity to resolve his situation was a denial of his rights under Title IX because he was not treated the same as other similarly situated individuals. (Id.).

Hernandez further alleges that Rice-Lively, in retaliation for his filing a complaint, somehow removed or suspended his membership in the mentoring listserv for the last month of the 2001 spring semester. (Id. ¶ 3.3) In addition, Plaintiff maintains Shaffer, Rice-Lively and Todaro conspired together to intimidate college members from helping him, and misrepresented that he was accusing a technical staff member of violating his email account. (Id. ¶¶3.3-3.4). He also claims Todaro impersonated her own sister in an attempt to interfere with Plaintiff's ability to settle this dispute. (Id. ¶3.7).

Plaintiff alleges that, during a meeting on May 22, 2001, Associate Dean of Students Arellano threatened him "with a lack of references for employment and career ramifications." (Id. ¶3.8). The following day Arellano informed Hernandez that she would not forward his request for an apology. Arellano further instructed Plaintiff that he would no longer receive any assistance from her or her office, or from the Office of the Ombudsman, and was barred from discussing his complaint with anyone from the graduate college. (Id. ¶3.10).

On May 28, Plaintiff emailed a description of his situation to the entire college community (Id. ¶3.11). In response, Shaffer contacted Plaintiff's cousin, a licensed attorney. Hernandez states he had falsely told Arellano that his cousin was providing him legal advice. Shaffer did not attempt to resolve the situation, but instead informed Plaintiff's cousin that the university was threatening legal action. Plaintiff maintains that, during the contact, Shaffer gained slanderous personal information regarding his past activities and family history. (Id. ¶3.12).

Hernandez also states his belief that Rice-Lively, Shaffer and Todaro somehow colluded with Defendant Doe to intercept and delete all of Plaintiff's email messages to his college email account for an entire week in June 2001. He maintains the deletion was done in retaliation for his exercise of his civil rights and was also intended to delete any helpful information provided to him regarding his situation. Plaintiff believes some of the messages may also have been responsive to pending employment applications. (Id. ¶3.13).

Plaintiff further states he attended a meeting with Arellano in October 2001 to request documentation of his complaint. According to him, the documentation he received was wholly incomplete and inaccurate. (Id. ¶3.14). Hernandez complains that, during the meeting, Arellano denied ever having dissuaded him from proceeding with his complaint. (Id. ¶3.15). He also believes Arellano permitted Todaro and Shaffer to listen to the meeting telephonically without his permission or prior knowledge. (Id. ¶3.16) Plaintiff additionally accuses Arellano of failing to inform him of the grievance procedures so he could have his complaint classified as a "formal complaint." (Id. ¶4.4).

Hernandez alleges Todaro and Shaffer continued to stalk and harass him during his employment with

the Pflugerville Public Library. According to Plaintiff, Todaro paid the library's computer consultant to place child pornography on Plaintiff's assigned computer and email account (Id. ¶ 3.17). He maintains that Shaffer informed the library board of his personal problems and prior access to pornography. (Id.). Hernandez further accuses Todaro and Shaffer of accessing his tax returns, monitoring his credit card purchases, retrieving his cell phone records, tracking his employment through driver's license records, and employing private investigators to stalk and harass him at his home. (Id. ¶ 3.18). He also alleges the two have enlisted certain librarians to monitor his library use and recruited other to make anonymous phone calls to his home. (Id. ¶3.19).

Hernandez asserts a number of claims based on these alleged facts. Specifically, he claims: (1) his First and Fourteenth Amendment rights of free speech, due process and equal protection were violated by the actions of Defendants; (2) Arellano denied his right to be enrolled in a public educational institution free from discrimination under both Title VI and Title IX; (3) Arellano cause the other defendants to subject him to abuse and discrimination; and (4) Shaffer, Todaro and Arellano conspired together to retaliate against him for exercising his rights to free speech, freedom of association, due process and equal protection.

Defendants have now filled a motion to dismiss Hernandez' complaint. They ague that : (1) Plaintiff has failed to allege that Doe, Yackey, Larsen, Filiatreau and Johnson are state actors; (2) Hernandez has failed to sufficiently allege a constitutional violation; (3) Plaintiff cannot recover under either Title VI or Title IX; and (4) they are entitled to qualified immunity. The parties have fully briefed the issues and this matter is now ripe for determination.

II. STANDARD OF REVIEW

A motion to dismiss under Rule 12(b)(6) "is viewed with disfavor and is rarely granted." *Lowery v. Texas A&M Univ. Sys.*, 117 F.3d 242, 247 (5th Cir. 1997) (quoting *Kaiser Aluminum & Chemical Sales, Inc. v. Avondale Shipyards*, 677 F.2d 1045, 1050 (5th Cir.1982)). The complaint must be liberally construed in favor of the plaintiff and all facts pleaded therein must be taken as true. *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 164, 113 S.Ct. 1160, 1161 (1993); *Baker v. Putnal*, 75 F.3d 190, 196 (5th Cir. 1996). The Supreme Court reminded lower courts that, in order to survive a motion to dismiss, a complaint need only contain "a short and plain statement of the claim showing that the pleader is entitled to relief." *Swierkiewicz v. Sorema N.A.* 534 U.S. 506, 122 S.Ct. 922, 998 (2002) (quoting FED. R.CIV.P. 8 (a)(2)). Thus, a plaintiff is generally not required to plead facts supporting each and every element of his claim or legal theory. Id. Rather, a complaint is sufficient if it "give[s] the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rest." Id. (quoting *Conley v. Gibson*, 355 U.S. 41, 78 S.Ct. 99, 103 (1957)). Dismissal is warranted only if "it appears beyond doubt that the plaintiff can prove no se of facts in support of his claim which would entitle him to relief. " *Conley*, 355 U.S. at 4-46, 78 S.Ct. at 102

III. ANALYSIS

A. Civil Rights Claims

Defendants first assert that Plaintiff's claims against Doe, Yackey, Larsen, Filiatreau and Johnson should be dismissed because he failed to allege they are state actors. In order to maintain a cause of action under for violation of civil rights under 42 U.S.C. § 1983, a plaintiff must show that he has been deprived of a federally protected right by a person acting "under color of state law." *West v. Atkins*, 487 U.S. 42, 48, 108

S.Ct. 2250 2255 (1988). Plaintiff identifies Doe, Yackey, Larsen, Filiatreau and Johnson as graduate students. In his complaint he asserts all the defendants "are or have claimed to be public officials." (Plf. 1st. Am. Compl. Intro. at 1). Although the complaint does not explicitly state so, it appears that these students worked in some capacity related to the graduate school computer facilities. Plaintiff believes the graduate students acted on behalf of the University of Texas. Liberally construed, this is sufficient to defeat the motion to dismiss on this basis.

Defendants also argue Plaintiff has failed to identify a constitutional violation. They maintain he has not demonstrated he has a constitutional or statutory right to a university-issued email account. (Def. Mot. At 3). This argument reflects a misunderstanding of the nature of Plaintiff's complaint, however. Plaintiff is alleging that the "violation" of his email account interfered with his ability to communicate within the college community. He contends this is a violation of his First Amendment rights. Hernandez also claims the infirmities in the subsequent investigation into the cause of the violation resulted in an equal protection violation and deprivation of his due process rights.

The First Amendment of the Constitution declares that "Congress shall make not law... abridging the freedom of speech." U.S. Const., amend. I. "It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828, 115 S.Ct. 2510, 2516 (1995). *See also Turner Broad. Sys. Inc. v. FCC*, 512 U.S. 622, 641-42, 114 S.Ct. 2445, 2458-59 (1994) (discrimination against speech because of its message presumptively unconstitutional); *Hobbs v. Hawkins*, 968 F. 2d 471, 481 (5th Cir. 1992) (viewpoint discrimination violates First

Amendment regardless of forum's classification). Here, Plaintiff alleges his email account was "violated," causing an interference with his ability to communicate with the college community. Interference with the speech of a particular speaker is an implicit discrimination based on the speaker's viewpoint. *See Giebel v. Sylvester*, 244 F. 3d 1182, 1188 (9th Cir. 2001) (actions of professor at state university in tearing down handbills posted on university bulletin boards publicizing former colleague's appearance at upcoming conference were viewpoint-discriminatory because the professor "south to silence speech by a particular speaker"). Accordingly, the Magistrate Court concludes Plaintiff had identified a constitutional violation under the First Amendment. [n2]

This does not end the inquiry. To state a claim for relief against the named defendants, a plaintiff must provide sufficient allegations to connect the defendants to the violation. Here, Plaintiff merely alleges globally that his email account was "violated." At no point in his complaint, however, does he make any specific allegations which identify who committed the "violation," when precisely the "violation" occurred, how the "violation" occurred, or even what the precise nature of the "violation" was. Hernandez has, therefore, failed

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[2] The Magistrate Court notes, however, that Hernandez indicates in his complaint that users with private email accounts were also able to send and receive communications within the college community, as well as access the listserv. (Plf. 1st Am. Compl. Into. At 16 & 18). Indeed, Plaintiff himself states he was able to send a message to the college community from an internet email account. (Id. ¶ 3.11). His assertion that "violation" of his university-issued email account constituted a First Amendment violation is, therefore, somewhat suspect.

to state factual allegations against Defendants sufficient to support a claim of a First Amendment violation. [n3]

Plaintiff further alleges globally that the "violation" of his email account, and the subsequent refusal to deal with his complaint or provide him assistance in investigating the "violation," constitute an equal protection violation. Once again, however, he does not make any specific factual allegations which identify either the responsible defendants or their purportedly improper acts.

Further, as Hernandez recognizes, the basic precept of the Equal Protection clause is the requirement that similarly situated persons receive equal treatment. *Wheeler v. Miller*, 168 F.3d 241, 252 (5th Cir. 1999) (Equal Protection clause essentially directs that all persons similarly situated be treated alike.) Nonetheless, Plaintiff fails to make any allegations evidencing such unequal treatment. Rather, he contends that he "does not have to provide proof of any king that other students who might have had their email accounts violated would receive better treatment" because he is a "class of one." (Plf. 1st Am. Compl. Intro. at 24). The Equal Protection clause can give rise to a cause of action on behalf of a "class of one," even when the plaintiff does not allege membership in a protected class or group. *Village of Willowbrook v. Olech*, 528 U.S. 562, 564, 120 S.Ct. 1073, 1074-75 (2000). However, to

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[3] The Court recognizes that Plaintiff has made a significant number of additional accusations of wrongful conduct on the part of Shaffer, including permitting censorship of email messages. However, he has failed to make nay allegations that these wrongful acts were ever directed at, or affected him. (Plf. 1st Am. Compl. Intro. at 6). They cannot therefore, support a claim for relief on his behalf.

state a claim sufficient for relief, the single plaintiff must still allege that he received intentionally different treatment from others similarly situated. Id. Plaintiff has not met this standard. His equal protection claim should, therefore, be dismissed.

Nor has Plaintiff stated a viable due process claim. The Fourteenth Amendment forbids government conduct that deprives "any person of life, liberty, or property without due process of law." U.S. Const., amend. IV. "Procedural due process considers not the justice of deprivation, but only the means by which the deprivation was effected." *Caine v. Hardy,* 943 F.2d 1406, 1411 (5th Cir. 1991). Substantive due process "protects individual liberty against certain government actions regardless of the fairness of the procedures used to implement them." *Collins v. City of Harker Heights,* 503 U.S. 115, 125, 112 S.Ct. 1061, 1066 (1992).

Plaintiff here has not specifically identified which type of claim he is attempting to assert. The Magistrate Court has already concluded Hernandez's allegations concerning the "violation" of his email account do not sufficiently state a First Amendment claim. Thus, any attempt to assert a general substantive due process claim based on the alleged "violation' of his email account would also fail. *See Finch v. Fort Bend Indep. Sch. Dist.* 333 F.3d 555, 563 (5th Cir. 2003) (substantive due process claim based on First Amendment claims stand or falls based on merits of First Amendment argument); *Canady v. Bossier Parish Scholl Bd.*, 240 F. 3d 437, 444 (5th Cir.) (court need not address general substantive due process claim because First Amendment provided adequate source of constitutional protection for claim arising from school dress code restrictions.) *See also Boroff v. Van Wert City Bd of Educ.*, 220 F.3d 465, 471 (6th Cir. 2000) (substantive due process should not be used as a fallback argument when First Amendment directly addresses the subject).

The Magistrate Court notes that a significant portion of Plaintiff's complaint is devoted to allegations of the improper and inadequate reactions of Arellano, Shaffer and Rice Lively in addressing his complaint regarding the "violation" of his email account. Liberally construed, these allegations may be Hernandez' attempt to assert a procedural due process claim based on a deprivation of a proper complaint and investigative process. However, Plaintiff has failed to connect these allegations to any constitutional deprivation. His due process claim fails on this basis alone. *See Board of Regents v. Roth*, 408 U.S. 564, 569, 92 S.Ct. 2701, 2705 (1972) (requirement of procedural due process apply only to deprivation of interests encompassed by Fourteenth Amendment).

Moreover, Hernandez does not complain that his complaint failed to receive attention. The essential requirement of procedural due process under the Constitution are notice and an opportunity to respond. *Cleveland Bd of Educ. V. Loudermill*, 470 U.S. 532, 542, 105 S.Ct. 1487, 1493 (1985). It is clear that Plaintiff was able to invoke the assistance of the Office of the Ombudsman for the university, as well as obtain meetings with various officials regarding his complaint. The fact that he was unhappy with the resolution of his complaint does not negate his receipt of process. *See Finch*, 333 F.3d at 562 (procedural due process satisfied where plaintiff met with officials prior to action, received written notice of reasons for action, was informed of opportunity to use grievance process, and availed herself of grievance process).

Plaintiff also complains that Arellano caused the other defendants to subject him to various forms of abuse and discrimination. Once again, his allegations are not factually specific as to the improper acts committed. More basically, however, Hernandez has not shown how this purported abuse or discrimination

constituted a violation of a constitutional protected right. His allegations, therefore, fail to state an actionable civil rights claim.

Hernandez further maintains that Shaffer, Todaro and Arellano conspired together to retaliate against him for exercising his constitutional rights to free speech, freedom of association, due process and equal protection. To prevail on a claim for retaliation, the plaintiff must establish (1) a specific constitutional right; (2) the defendant's intent to retaliate against the plaintiff for exercising that right; (3) a retaliatory adverse act; and (4) a casual showing that, but for the retaliatory motive, the incident complained of would not have occurred. *McDonald v. Steward*, 132 F.3d 225, 231 (5th Cir. 1998). The plaintiff must, however, allege more than just his personal belief that he is the victim of retaliation. *Johnson v. Rodriguez*, 110 F.3d 299, 310 (5th Cir. 1997). *See also Woods v. Smith*, 60 F.3d 1161, 1166 (5th Cir. 1995) (mere conclusionary allegations of retaliation not enough to withstand motion to dismiss). Rather, he must produce direct evidence of motivation or "allege a chronology of events from which retaliation may plausibly be inferred." *Jones v. Greninger*, 188 F.3d 322, 325 (5th Cir. 1999). Plaintiff has wholly failed to meet this standard. He presents not a single factual allegation which would evidence an improper motivation on the part of the named defendants, or indeed anything beyond his mere belief that these defendants are responsible for the wrongs allegedly inflicted upon him. Accordingly, the motion to dismiss should be granted as to Plaintiff's civil rights claims. [n4]

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[4] The Magistrate Court recognizes that a plaintiff should generally be permitted an opportunity to provide more detail in an additional pleading. *See Great Plaints Trust Co. v. Morgan Stanley Dean Witter & Co.*, 313 F.3d 305, 329 (5th Cir. 2002) (noting general practice in district court of affording plaintiffs at least one opportunity to cure

B. Statutory Claims

Defendants also move to dismiss Plaintiff's claims under Title VI and Title IX as failing to state a cognizable claim against them.

Defendants also move to dismiss Plaintiff's claims under Title VI and Title IX as failing to state a cognizable claim against them. Under Title IX no person may be excluded from participation in, denied the benefits of, or subjected to discrimination under any education program on the basis of sex. 20 U.S.C. ¶ 1681. Title VI includes the same prohibition on conduct based on race, color, or national origin, as to any federally funded program. 42 U.S.C. ¶2000d.

Although the Fifth Circuit has not yet spoken on the issue, a number of courts have concluded Title IX provides for suit against institutions, not against individual defendants. *Kinman v. Omaha Pub. Sch. Dist.*, 171 F.3d 607, 611 (8th Cir. 1999); *Smith v. Metro. Sch. Dist. Perry Township*, 128 F.3d 1014, 1019 (7th Cir. 1997); *Lipsett v. Univ. of Puerto Rico*, 864 F.2d 881, 901 (1st Cir. 1988);*Goins v. Hitchcock I.S.D.*, 191 F. Supp. 2d 860, 869 (S.D. Tex. 2002);*Leija v. Canutillo Indep. Sch. Dist.*, 887 F. Supp. 947, 953 (W.D. Tex.

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pleading deficiencies before dismissing a case). The sufficiency of Plaintiff's pleading was, however, examined prior to the filing of Defendants' motion to dismiss. In ruling on Defendants' request to have Plaintiff file a Rule 7(a) reply addressing qualified immunity, the undersigned found that Plaintiff had not alleged sufficient facts to overcome the defense of qualified immunity, but had made only global, conclusory assertions against the defendants without specifying how each was personally involved. (ORDER 3/16/2004). Plaintiff filed his First Amended Complaint in response to that order. He has, therefore, already been afforded one opportunity to correct his pleading deficiencies, to no avail. He has failed to show why he should be afforded a second such opportunity.

1995); *Bowers v. Baylor Univ.*, 862 F. Supp. 142, 145-46 (W.D. Tex.1994). Courts have similarly concluded an action under Title VI is not properly brought against individual defendants. *Shotz v. City of Plantation*, 344 F. 3d 1161, 1171 (11th Cir. 2003) (beyond question that individuals are not liable under Title VI); *Buchanan v. City of Bolivar*, 99 F.3d 1352, 1356 (6th Cir. 1996) (Title VI claim fails because asserted against individuals, not school), *Simms v. Unified Gov't of Wyandotte County/ Kansas City*, 120 F.Supp. 2d 938, 954 (D. Kan. 2000); *Farmer v. Ramsay*, 41 F.Supp. 2d 587, 592 (D. Md. 1999): *Jackson v. Katy Indep. Sch. Dist.*, 951 F.Supp. 1293, 1298 (S.D. Tex. 1999). As Plaintiff has asserted his Title VI and Title IX claims soley against individuals, the Magistrate Court recommends those claims be dismissed.

C. Qualified Immunity

Finally, Defendants maintain they are entitled to qualified immunity from suit. To prevail in a § 1983 suit, a plaintiff must overcome an official's defense of qualified immunity. *Williams v. Kaufman County*, 352 F.3d 994, 1002 (5th Cir. 2003). To determine whether relief is appropriate the court must undertake a two-step analysis. First, the court must evaluate whether a "plaintiff's allegations, if true, establish a constitutional violation." *Hope v. Pelzer*, 536 U.S. 730, 736, 122 S.Ct. 2508, 2514 (2002) (citing *Saucier v. Katz*, 533 U.S. 194, 201, 121 S.Ct. 2151, 2156 (2001)). If not, the officer is entitled to qualified immunity, and the court need not continue to the second step of the analysis. *Chavez v. Martinez*, 538 U.S. 760, 766, 123 S.Ct. 1994, 2000 (2003).

If a constitutional violation if found to have occurred, the court must determine whether the defendant's actions violated "clearly established statutory or constitutional rights of which a reasonable person would have know." *Hope*, 536 U.S. at 739, 122 S.Ct. at 2515 (quoting *Harlow v. Fitzgerald*, 457 U.S.

800, 818, 102 S.Ct. 2727, 2738 (1982)). The contours of the right "must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful....but it is to say that in the light of pre-existing law the unlawfulness must be apparent." Id. (quoting *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034 (1987)). An official's conduct is therefore objectively reasonable unless "all reasonable officials would have realized the particular challenged conduct violated the constitutional provisions sued on." *Wooley v. City of Baton Rouge*, 211 F. 3d 913, 918-19 (5th Cir. 2000).

The Magistrate Court has already concluded that Plaintiff's allegations have failed to state a constitutional violation. Defendants are, therefore, entitled to qualified immunity as to Plaintiff's civil rights claims. *See Saucier*, 533 U.S. at 201, 121 S.Ct. at 2156 (if no constitutional right was violated, there is no necessity for further inquires concerning qualified immunity); *Price v. Roark*, 256 F.3d 364, 369 (5th Cir. 2001) (if the allegations do not establish the violation of a constitutional right, the official is entitled to qualified immunity).

III. RECOMMENDATION

The undersigned **RECOMMENDS** that the District Court **GRANT** Defendants', Margarita Arellano, Julie Beth Todaro, Roberta Ivy Shaffer, John Doe, Margaret Ann Yackey, Peter Larsen, Amy Filiatreau, and AJ Johnson, Motion to Dismiss (Clerk's Dkt. #35).

IV. OBJECTIONS

The parties may file objections to this Report and Recommendation. A party filing objections must

specifically identify those findings or recommendations to which objections are being made. The District Court need not consider frivolous, conclusive, or general objections. *See Battle v. United States Parole Comm'n*, 834 F.2d 419, 421 (5th Cir. 1987).

A party's failure to file written objections to the proposed findings and recommendations contained in this Report within ten (10) days after the party is served with a copy of the Report shall bar that party from de novo review by the District Court of the proposed findings and recommendations in the Report and, except upon grounds of plain error, shall bar the party from appellate review of unobjected-to proposed factual findings and legal conclusions accepted by the District Court. See 28 U.S.C. § 636 (b)(1)(C); *Thomas v. Arn*, 474 U.S. 140, 150-53, 106 S.Ct. 466, 472-74 (1985); *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1428-29 (5th Cir. 1996) (en banc).

The Clerk is directed to send a copy of this Report and Recommendation to the parties by certified mail, return receipt requested.

SIGNED this __6th__ day of August, 2004.

s/ Robert Pitman

ROBERT PITMAN

UNITED STATES MAGISTRATE JUDGE

Appendix D.....

State Texas Statutory Code

Education Code.

Title I General Provisions Chapter. 1 Sec 1.001 Applicability, 1.002 Equal Education Services or Opportunities (a), ...32D

Title II Public Education Chapter. 4 Sec. 4.001 Public Education Mission and Objectives, Title 3 Higher Education. (Amended 1995) 33D

(abbreviated paragraphs only)

Online; http://tlo2.tlc.state.tx.us.statutes/ed.toc.htm

EDUCATION CODE

TITLE 1. GENERAL PROVISIONS

CHAPTER 1. GENERAL PROVISIONS

Sec. 1001. APPLICABILITY. (a) This code applies to all educational institutions supported in whole or in part by state tax funds unless specifically excluded by this code.

(b) Except as provided by Chapter 18, Chapter 19, Subchapter A, Chapter 29, or Subchapter E, Chapter 30, this code does not apply to students, facilities, or programs under the jurisdiction of the Department of Aging and Disability Services, the Department of State Health Services, the Health and Human Services Commission, the Texas Youth Commission, the Texas Department of Criminal Justice, a Job Corps program operated by or under contract with the United States Department of Labor, or any juvenile probation agency.

Added by Acts 1995, 74th Leg., ch. 260, Sec. 1, eff. May 30, 1995.

Amended by Acts 2005, 79 th Leg., ch 377, Sec. 2, eff. June 17, 2005.

Sec. 1.002. EQUAL EDUCATIONAL SERVICES OR OPPORTUNITIES. (a) An educational institution undertaking to provide education, services, or activities to any individual within the jurisdiction or geographical boundaries of the educational institutions shall provide equal opportunities to all individuals within its jurisdiction or geographical boundaries pursuant to this code.

TITLE 2. PUBLIC EDUCATION

SUBTITLE A. GENERAL PROVISIONS

CHAPTER 4. PUBLIC EDUCATION MISSION, OBJECTIVES, AND GOALS

Sec. 4.001. PUBLIC EDUCATION MISSION AND OBJECTIVES. (a) The mission of the public education system o this state is to ensure that all Texas children have access to a quality education that enables them to achieve their potential and fully participate now and in the future in the social, economic, and educational opportunities of our state and nation. That mission is grounded on the conviction that a general diffusion of knowledge is essential for the welfare of this state and for the preservation of the liberties and rights of citizens. Its is further grounded on the conviction that a successful public education system is directly related to a strong, dedicated, and supportive family and that parental involvement in the school is essential for the maximum educational achievement of a child.

Appendix E.....

Other corroborating material the petitioner believes essential to understand the suit and his Petition.

1) Official Letter from Defendant Respondent Arellano given in person in October 2001 to Petitioner Hernandez.....34E

2) Letter from Office of Civil Rights, US Dept of Education sent in 2002 to Hernandez.....36E

3) Email message from witness and grad student Carlos Ovalle, sent to Hernandez in May 2001.....42E

4) Printed webpage from University's website describing listserv operator's ability to unsubscribe members 44E

5) Printed webpage from University's website giving description of the college listserv in question....46E

OFFICE OF THE DEAN OF STUDENTS
THE UNIVERSITY OF TEXAS AT AUSTIN

October 22, 2001

Joe Hernandez
P.O. Box 7491
Austin, TX 78713

Dear Joe,

You first came to see me on May 1st because you had a complaint about being dropped from a list serve in the School of Library Science. You also told me that the Ombudsman's Office did not take your case because you had not contacted the individuals involved and you needed to do this before using their services. The Ombudsman's Office was willing to help you but only until after you had discussed this matter with faculty/ staff in your Department. It is my understanding that you came to my office because I over see the Office of the Ombudsman and you wanted me to do something about it. I explained to you that my relationship with that office is one where I serve as an administrative mentor since they are an independent office who report directly to the President.

I offered to assist you to get in touch with D. Roberta

Shaffer, Dean of the Graduate School of Library Science, since you had never met with her to discuss your concerns. I talked to the Dean on your behalf and she agreed to meet with you and discuss this matter. I know you met sometime in the early part of the summer but I found out based on your emails you sent me that her explanations were not to your satisfaction.

Unfortunately, there is nothing else I can do for you because that matter has to be resolved with the Graduate School of Library Science. One recommendation that I would like to give you is to please contact the students who manage the list serve in question and bring up your concerns.

Sincerely,

s/ Margarita M. Arellano

Margarita M Arellano
Associate Dean of Students
Retention Services

P.S. I am enclosing copies of emails that I sent or received from you.

UNITED STATE DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS
SOUTHERN DIVISION, DALLAS OFFICE
OCT 02 2002

Ref: 06022016

06022036

Mr. Jose Hernandez
231 Wallace Road.
San Antonio, Texas 78237-3115

Dear Mr. Hernandez:

This letter is in response to your electronic mail (e-mail) correspondence, date September 2, 2002, regarding the processing of the above referenced complaints you filed with the U.S. Department of Education, Office for Civil Rights (OCR), Southern Division, Dallas Office. In these complaints, you alleged that the University of Texas at Austin (UT), Austin, Texas, Graduate School of Library and Information Science (GSLIS) discriminated against you, on the basis of race and sex, Hispanic male, in violation of Title VI of the Civil Rights of 1964 and Title IX of the Education Amendments of 1972. Specifically, you allege that UT altered or tampered with your college e-mail account and removed you from the college "listserv" without due process on the bases of your race and sex. In addition, you alleged that in May 2001

officials in the GSLIS retaliated against you for attempting to protect your civil rights. In this e-mail correspondence, you are again raising the same or similar concerns regarding the processing of you complaint with this Office ând requesting that your complaints be addressed with the U.S. Department of Justice, Civil Rights Division. We have reviewed al the actions taken by the OCR in processing your various complaints and have summarized them as following.

You filed your initial complaint (#06022016) with the Dallas OCR Office on November 27, 2001. In this complaint, you alleged that UT discriminated against you, by deliberately tampering with your e-mail listserv account so as to remove you from the UT/college listserv as well as deleting a weeks worth of your college e-mail before you could retrieve it and also for removing your membership from a second college listserv. On the OCR Internet Complaint Form that you e-mailed to our Office, the you stated that the "discrimination was either for race or sex." However, the information you provided did not support your contention that race or sex was a factor in the alleged discriminatory actions taken against you.

In order to clarify this complaint, OCR staff spoke with you in a telephone conference and reviewed subsequent e-mails you submitted after OCR opened the complaint. In this conversation with OCR and throughout your e-mails, you stated that you believed that the alleged discriminating officials took offense to statement you made in your e-mail postings on the listserv and viewed you e-mail postings as an opportunity to exclude you from UT. You also indicated that you believe that UT

had a pattern of abusing students' concerns. After explaining to you the laws and regulations that OCR enforces you were asked why you believed that alleged discrimination against you was based on your race and sex. You stated that because you are a Hispanic male and the persons who allegedly altered your e-mail account were white females, you felt that this was obviously discrimination on the basis of race and sex. You provided no other information to support your contention that race or sex was a factor in the actions of which you complained. You also provided information indicating that UT also denied another graduate student (white male) access to college listserv in an attempt to censor that person because he criticized a professor. After considering all the information you provided, we determined that you failed to provide sufficient information to establish a factual basis for you belief that discrimination, on the basis of race or sex, had occurred. Based on this information, we administratively closed this complaint on February 6, 2002.

On February 12, 2002, OCR received e-mail correspondence from you requesting OCR to reconsider its decision to close your complain; however, before OCR had an opportunity to respond to your request, you filed a second complaint with OCR on February 14, 2002. OCR addressed your requests to reconsider the closure of the first complaint by opening the second complaint. This new complaint provided more detailed information regarding the nature of your allegations of alleged discrimination and retaliation and included matter not previously raised in your first complaint. In your second complaint, you stated that the actions taken against you were because you "upset someone" and the UT officials who took the actions were done by persons who bore a "personal grudge" against you. You further state that

you felt the UT officials who allegedly discriminated against you had the technical expertise to violate your e-mail account. In reviewing the second complaint, we determined that you failed to provide sufficient information to establish a factual basis for your belief with the processing of this complaint. As a result, OCR administratively closed this complaint on March 14, 2002.

OCR received correspondence from you dated March 24, 2002, requesting that I review the decision to administratively close your second complaint. In a letter dated April 22, 2002, the Dallas Office responded to your March 24, 2002, letter. You were advised that your information had been thoroughly reviewed and considered and the decision not to proceed with the processing of your complaints was in accordance with OCR's case processing procedures.

Finally, from the details provided by you in your latest e-mail correspondence to this Office on September 2, 2002, a thorough review shows similar reiterations of the details that surround the alleged facts of discrimination taken against you that you have outlined in your previous complaints. Again, you have raise similar objections to the way this Office has responded to you and handled your complaints; however, you still have not proffered the necessary factual basis for your belief that any acts were done to you by UT on the basis of civil rights protected statutes and regulations enforced by this Office. Therefore, the handling of your complaints by this Office and the staff of this Office have been in accordance with our case processing procedures.

In summary, based upon a thorough review of the complaints files and the information that you provided in your e-mail of September 2, 2002, to support your request that our Office review it's decisions to close those complaints does not warrant a change in the determination made by OCR. Therefore, I have concluded that the processing of your complaints by the staff of this Office has been conducted in accordance with the OCR case processing procedures.

With respect to your request to forward the contents of the above referenced complaint files to the U. S. Department of Justice, we are providing you with the address of that agency. If you wish to pursue this matter further, you can contact the agency at the following address for whatever action they deem appropriate:

U.S. Department of Justice
Civil Rights Division
950 Pennsylvania Avenue, NW
Educational Opportunities Section PBH
Washington, D.C., 20530

If after receiving this letter, you continue to have concerns regarding the processing of your complaints, those concerns may be raised with the Deputy Assistant Secretary for Civil Rights (DAS). The DAS will review my response to your concerns to ensure that our Office was responsive and that decisions were made in conformance with the laws and regulations enforced by OCR. A request for the DAS to review the decisions of the Director should be made, in writing to:

Deputy Assistant Secretary for Civil Rights
U.S. Department of Education

Office for Civil Rights
Mary E. Switzer Building
330 C Street
Washington, D.C. 20202

Please be aware that your request should address, with as much specificity as possible, the factual or legal questions that would change the determination regarding the complaints. The DAS will issue a final agency determination on behalf of the U.S. Department of Education. This is the final step in the complaint review process. There is no further administrative review of case determinations within the U.S. Department of Education.

If you have any questions or concerns regarding this letter, please contact our Office at (214) 880-2463.

Sincerely,

s/ Taylor D. August

Taylor D. August, Director
Office for Civil Rights
Southern Division Dallas Office
1999 BRYAN STREET, SUITE2600, DALLAS, TEXAS 75201-6810

Our mission is to ensure equal access to education and to promote educational excellence throughout the nation

Yahoo! Mail

inbox for jrhernan2201@yahoo.com

Date: Mon, 28 May 2001 16:16:01- 0500 (CDT)

From: Carlos Ovalle <cjovalle@gslis.utexas.edu>

To: joe hernandez <jrhernan2201@yahoo.com>

CC: <glissa@lists.cc.utexas.edu>, Mary-Lynn Rice-Lively <marylynn@gslis.utexas.edu>

Subject: Re: A Notion of Virtue and Other Misgivings

I've got a couple of thoughts about this matter. Just for the record, I used to be one of the glissa list operators about a year ago, so I have some idea of how the addition/removal process works.

First, there is on direct connection between the GLISSA list and the school administration. The only people who have authority or ability to add and remove subscriptions fro the glissa list are the glissa listowner, which are usually one or more of the glissa codirectors. Nobody else can do this. The glissa list is not an official school list. The glissa list is for the students, by the students. Faculty, staff, and administration are welcome to post messages to the list, but they have no control over it.

Second- and if this wasn't evident before, it should be after some of the recent posts, there really isn't a set-in-stone policy about what type of posts are allowed on the glissa list. It's pretty much self-regulating, although occasionally a list owner may suggest that a conversation is best taken off of the list.

Third, the only reason people are removed from the glissa list is when they request to be removed or their mailbox is full (which happens fairly regularly). If a recipients mailbox is full, then every message sent to the glissa list that should go to the recipient is bounced back to the listowner with an error message. This quickly fills the listowner's account, so the listowner usually unsubscribes the person after a relatively short time. The glissa listowners don't censor or moderate the list- the list isn't set up that way. It's actually impossible to do so beyond restricting access to the list, which as far as I know has never been done.

My suspicion is that this is what occurred- a full mailbox. It happens all the time. The glissa listowners don't have a way of contacting people when they are removed. If this is in fact what occurred, it should be logged somewhere.

So, my first question is, did you contact the glissa list owner? The GLISSA website and the initial subscription message both mention the contact info there, listown@gslis.utexas.edu.

I can't comment about the other allegations, but there seems to be a great deal of miscommunication involved. I hope everything is resolved satisfactorily

Carlos Ovalle

http://us.f131.mail.yahoo.com/ym/ShowLetter?
Msgid=9151_5882.....6/14/01

UT Austin ACTIS Mailing List Answers- Unexpectedly Unsubscribed

ACITS Mailing Lists- Answers

Why did I get a message saying that my request to unsubscribe to a mailing list was successfully complete? I made no such request.

This can happen in two ways: unintentionally or intentionally.

Unintentionally- -

This covers most circumstances and is usually a result of a list being configured so that users are automatically unsubscribed when attempted mail delivery fails and bounces back to the sender (the list processor). The problem in such instances could be with timing out at some intermediate machine in the delivery routing, or by your host machine being off-line for an extended period.

Whatever the reason, the solution is to subscribe to the list again, just as if it were a new subscription- - see

http://www.utexas.edu/cc/mailinglist/answers/subscribing.html

This way to get back on a mailing list should be tried first. It will usually be successful for open-subscription mailing lists.

Intentionally- -

Occasionally, a list owner will intentionally unsubscribe someone, for reasons related to the administration of the list. In this case, you must request reinstatement from

the list owner. The list owner of any list on the lists.cc.utexas.edu server can be reached by e-mail at

listname- request@lists.cc.utexas.edu

where listname is the actual name of the list. For example, for the "bungeejumpers" mailing list, the owner could reached at

bungeejumpers- request@list.cc.utexas.edu

Mailing List: Introduction Steps Answers

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31 January 2000

ACITS at UT Austin

Comments to : remark@cc.utexas.edu

http://www.utexas.edu/cc/mailinglist/answers/unexpected-unsub.html 5/16/2001

GLISSA: membership and governance

GLISSA

Graduate Library and Information Science Student Association

Membership

If you are enrolled in GSLIS, you are a member already! It's that easy! There are many benefits to membership. Most students begin by signing on to the mailing list. It is a great way- - and, in some cases, the only way- - to stay informed about classes, job and internship opportunities, campus events, administrative deadlines, social gatherings, and professional association meetings.

Governance

The current GLISSA co-directors are:

Margaret Yackey [yackey@mail.utexas.edu]
Peter Larsen [plarsen@gslis.utexas.edu]
Amy Filiatreau [filiatreau@mail.utexas.edu]
AJ Johnson [adrianj@gslis.utexas.edu]

If you are in El Paso or San Antonio and want to be a Student representative, please send email to glissa@gslis.utexas.edu.

http://www.gslis.utexas.edu/~glissa/glissa.html 5/15/01

STUDENT ASSOCIATION OF THE SCHOOL OF INFORMATION (SASI)

Online Organization Registration

Type:

Educational and Departmental Organization

Purpose:

The official purpose is threefold; 1) to serve as a forum to consider matters of professional interest and thus widen the educational horizons of its members; 2) to advance the interests of the student body of the Graduate School of Library Science with the Library School Administration; and 3) to foster a spirit of professional camaraderie and cooperation among its members.

Membership:

1) Must be registered in the UT graduate school and working toward the MLS; 2) taking courses in GSLS towards a provisional librarian certificate; 3) taking at least one course in Library Science.

Functions:

GLISSA is working to building a minority scholarship fund to encourage attendance at the Graduate School of Library Science by minority students. Sandwich seminars enable members to hear about mutual concerns. This organization also encourages participation by its members in local conference through provision of excursion plans.

http://utdirect.utexas.edu/dsorg.wb?code=00186

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